National Union Of Petroleum & Chemical Industry Workers v Amalgamated Properties & Industries Bhd

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 35 OF 1987
LEE HUN HOE CJ (BORNEO), WAN SULEIMAN AND WAN HAMZAH SCJJ
8 SEPTEMBER 1987 AND 25 NOVEMBER 1988

Labour Law – Collective agreement – Payment of bonus – Retrenched workers – Whether entitled to bonus for past year in which they were retrenched – Industrial Court ordering payment of bonus in respect of years in which they were retrenched – Application for certiorari to quash decision of Industrial Court – Order of certiorari granted by High Court – Appeal to Supreme Court allowed – Industrial Relations Act 1967, s 56

Administrative Law – Certiorari – Application to quash order of Industrial Court – Interpretation of collective agreement by Industrial Court – Industrial Court did not act beyond jurisdiction – Jurisdiction to interpret and if considered desirable to vary collective agreement – Industrial Relations Act 1967, s 56

In this case some of the employees of the respondent company were retrenched in 1984 and 1985. They were not paid bonus for part of the year in which they were retrenched. The respondent company contended that they were not entitled to bonus in respect of the year in which they were retrenched on the ground that the collective agreement did not provide for payment of such bonus but of bonus in respect of completed years of employment only. Article 3(a) of the collective agreement provided that 'the company shall pay an annual bonus at the end of each calendar year equivalent to 1.6 months' last drawn basic salary'. Article 3(c) provided that new employees in any one year shall be paid proportionate bonus based on the completed months of service and part thereof calculated up to 31 December of that year. The dispute was referred to the Industrial Court which granted an order requiring the respondent company to pay bonus in respect of the years in which the employees were retrenched.

The respondent company applied to the High Court for an order of certiorari to quash the order of the Industrial Court and the High Court granted the application. The appellant union appealed to the Supreme Court.

Held (Lee Hun Hoe CJ (Borneo) and Wan Hamzah SCJ), allowing the appeal:

(1) Article 30(a) of the collective agreement is ambiguous but it was open to the Industrial Court to interpret it by analogy to art 30(c) as it did and by adopting such interpretation it could not be said that the Industrial Court acted beyond its jurisdiction. It had the jurisdiction to interpret the collective agreement, either rightly or wrongly.

(2) The Industrial Court had power to make such variation of the terms of the collective agreement under s 56(2)(c) of the Industrial Relations Act 1976, if it considered such variation desirable.

(3) The order of the Industrial Court should therefore be restored.

Legislation referred to
Industrial Relations Act 1967 s 56(1), (2)

Appeal from: Originating Motion No 32-56-86 (High Court, Kuala Lumpur)

KP Gengadharan for the appellant.
Dennis Xavier (*Vincent Chandran* with him) for the respondent.

Cur Adv Vult

Wan Hamzah SCJ (delivering the judgment of Lee Hun Hoe CJ (Borneo) and himself): In 1984 and 1985 some of the employees of the Amalgamated Properties & Industries Bhd (the respondent company) were retrenched. They were not paid bonus for part of the year in which they were retrenched. The respondent company contended that they were not entitled to bonus in respect of the year in which they were retrenched on the ground that the collective agreement did not provide for payment of such bonus but of bonus in respect of completed years of employment only. Article 30 of the agreement dealing with bonus reads as follows:

(a) The company shall pay an annual bonus at the end of each calender year equivalent to 1.6 months' last drawn basic salary exclusive of overtime and allowance of any description.

(b) Employees on probation as at 31 December of the year shall not be entitled to any bonus.

(c) New employees in any one year shall be paid proportionate bonus based on completed months of service and part thereof calculated up to 31 December of that year.

(d) Payments of the bonus for the year shall be made by the company on the pay day of January the following year.

The National Union of Petroleum and Chemical Industry Workers (the appellant union) representing the retrenched employees made a complaint to the Industrial Court under s 56 of the Industrial Relations Act 1967 and asked for an order against the respondent company to comply with the collective agreement. The Industrial Court granted an order which it called Award No 158 of 1986 requiring the respondent company to pay bonus in respect of the years in which the employees were retrenched. Being aggrieved with the Industrial Court's order the respondent company applied to the High Court for an order of certiorari to remove the Industrial Court's order into the High Court for the purpose of quashing it on the following grounds:

(1) The Industrial Court has no jurisdiction to imply and/or create a fresh term in a collective agreement on a complaint under s 56(1) of the Industrial Relations Act 1967.
(2) The Industrial Court has no jurisdiction to order compliance of a term that is not part of the collective agreement.
(3) The Industrial Court has no jurisdiction to exercise its powers under s 33(1) of the Industrial Relations Act 1967 on a complaint under s 56(1).

The High Court granted the order of certiorari, and the appellant union now appeals to the Supreme Court against the High Court's decision.

Subsections (1) and (2) of s 56 of the Industrial Relations Act read as follows:

> 56(1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.
>
> (2) The Court may, upon receipt of the complaint, –
> (a) make an order directing any party –
> (i) to comply with any term of the award or collective agreement; or
> (ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement;
> (b) make such order as it deems fit to make proper rectification or restitution for any contravention or any term of such award or collective agreement; or
> (c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

In making its order the Industrial Court stated as follows:

> Article 30(a) of the agreement provides for payment of annual bonus at the *end of each calendar year*. It does not require the employees must complete the year's service before the annual bonus is payable. In fact, it is the action of the company in retrenching its employees that prevented them from completing their year's service. Looking at art 30(c), new employees are given proportionate bonus based on their *completed months of service and part thereof*. Not only completed months attract proportionate bonus but also part of the month. By clear implication, we hold that the retrenched workers are entitled to bonus under art 30 for *completed months of service and part thereof*; payment to be made within one (1) month from date hereof.

It appears to us that art 30(a) is ambiguous, but in our view it was open to the Industrial Court to interpret it by analogy to art 30(c) as it did, and by adopting such interpretation it cannot be said that the Industrial Court acted beyond its jurisdiction. It had the jurisdiction to interpret the collective agreement, either correctly or wrongly. As regards the contention that the Industrial Court had interpreted wrongly and had thereby varied the terms of the collective agreement, we find that the Industrial Court had the power to make such variation under s 56(2)(c) if it considered such variation desirable. Apparently in the opinion of the Industrial Court it was desirable to maintain consistency with art 30(c) in considering whether the retrenched employees should be paid the claimed bonus.

We allow the appeal and order that the Industrial Court's order be restored. Costs to the appellant union here and in the High Court. Deposit should be refunded to the appellant union.

Appeal allowed.

Solicitors: *Aziz Abdullah & Co*; *Xavier & Chandran*.

Reported by *Prof Ahmad Ibrahim*

Fira Development Sdn Bhd v Goldwin Sdn Bhd

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 173 OF 1987
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND WAN HAMZAH SCJJ
9 FEBRUARY AND 26 OCTOBER 1988

Civil Procedure – Judgment in default – Application to set aside judgment – Delay in filing petition – Merits of case not considered by trial judge

In this case the respondents had agreed to build houses for the appellants. The respondents erected and completed the houses. The respondents claimed that the appellants owed them $135,964.22 being the balance unpaid and interest. The appellants gave the respondents three cheques totalling $25,000 but these were dishonoured. The respondents brought an action against the appellants and as no appearance was entered it obtained judgment in default. The appellants thereupon sought leave to enter appearance and to set aside the judgment in default and to stay execution. The application was dismissed by the learned judge of the High Court since he held that the appellants were not able to satisfy the court with the reason for the delay in making the application and the reason for the failure to enter appearance. He stated that it was not necessary for him to consider the merits of the case. The appellant appealed.

Held, allowing the appeal:

(1) Where an application is made for setting aside a judgment in default the learned judge would have to consider the merits of the case.

(2) Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment on terms and allow the case to be heard on the merits.

(3) As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously the reason, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion.

(4) The application should clearly be made promptly and within a reasonable time. But the court will in a fit case disregard lapse of time.

Cases referred to

1 *Evans* v *Bartlam* [1937] AC 473 (folld)
2 *White* v *Weston* [1968] 2 QB 647 (refd)
3 *L Oppenheim & Co* v *Mahomed Haneef* [1922] 1 AC 482 (refd)
4 *Beale* v *Macgregor* (1886) 2 TLR 311 (refd)

Appeal from: Civil Suit No 1857 of 1985 (High Court, Ipoh)

Darshan Singh for the appellants.
Roshan Kumar for the respondents.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We allowed the appeal with costs here and the court below. We stated we would give our reasons later. We do so now.